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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA

v.

JUDGE JOSEPH W. HUGHES, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The case is here on certificate and the circuit court of appeals wrote no opinion. The opinion of the United States District Court for the Eastern District of Oklahoma in the case entitled *In re Micco's Estate,* out of which this proceeding grew, is reported in 59 F. Supp. 434.

JURISDICTION

The certificate of the circuit court of appeals was filed September 7, 1945. On December 17, 1945, the United States filed a motion requesting that the Court order up the entire record and

decide the whole matter in controversy. On January 2, 1946, this Court ordered that "Further consideration of the motion to bring up the entire record and cause is postponed until the hearing of the case on the certificate at which time counsel may direct their argument to the question of the power of the Court to order up the entire record and cause pursuant to 28 U. S. C. 346." The jurisdiction of the Court is invoked under section 239 of the Judicial Code, as amended, 28 U. S. C. 346.

QUESTIONS PRESENTED

1. Whether, after certification of a question in a proceeding originating in the circuit court of appeals by the filing of an application for leave to file a petition for a writ of mandamus directing a judge of the United States district court to hear and determine a case, this Court has the power to order up the entire record and dispose of the whole cause.

2. [THE CERTIFIED QUESTION] May the circuit court of appeals, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of a proceeding removed from the County Court of Okfuskee County, Oklahoma, to the federal district court pursuant to section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239?

3. Whether a proceeding instituted in a county court of Oklahoma for letters of administration

and to determine the heirs of an enrolled restricted member of the Five Civilized Tribes who died intestate seized of both restricted and unrestricted property and who was survived by restricted Five Tribes Indians claiming to be his heirs is removable to the United States district court under section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 46–65.

STATEMENT

This proceeding came before the circuit court of appeals on an application by the United States for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate a judgment of dismissal and remand entered in the case entitled *In the Matter of the Estate of Peter Micco, deceased*, Civil No. 854, in the District Court of the United States for the Eastern District of Oklahoma, and to hear and determine that cause upon the merits.

The *Peter Micco* case is a proceeding to determine the heirs of an enrolled, restricted Indian member of the Five Civilized Tribes who died May 26, 1942, intestate, seized of both restricted and unrestricted property having a value of more than

$400,000, and who was survived by restricted Five Tribes Indians claiming to be his heirs. Certificate, pp. 1–3; see also *In re Micco's Estate*, 59 F. Supp. 434 (E. D. Okla.); *Merrell* v. *United States*, 140 F. 2d 602 (C. C. A. 10).[1] On the same day the Indian died, a petition for letters of administration was filed in the County Court of Okfuskee County, Oklahoma. Shortly afterwards, the United States Probate Attorney on behalf of the guardian of the next-of-kin wards moved to dismiss on the ground that the county court was without jurisdiction and on the ground that the petitioner had no legal right to be appointed administrator. The county court did not rule on the motion but granted letters of administration on June 4, 1942. On that date written notice of the pendency of the proceeding was served on the Superintendent for the Five Civilized Tribes and the United States seasonably caused the case to be removed to the United States District Court for the Eastern District of Oklahoma pursuant to the provisions of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239 (Certificate, p. 1).

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[1] In the *Merrell* case the circuit court of appeals held that the United States District Court for the Northern District of Oklahoma was without jurisdiction of a proceeding to administer the estate of *Peter Micco*, on the ground that the County Court of Tulsa County from which the proceeding had been removed had no jurisdiction since jurisdiction over the same estate first had been exercised by the County Court of Okfuskee County in the eastern district of Oklahoma.

After the case was removed the United States filed a complaint in intervention in its own behalf and in behalf of its restricted Indian wards, heirs apparent of Peter Micco, praying that the court determine the heirs and determine that part of the decedent's property which was restricted. On motion of the administrators the district court on March 6, 1945, entered an order dismissing the complaint in intervention without prejudice and remanding the proceeding to the County Court of Okfuskee County (Certificate, pp. 1–3).

On March 10, 1945, the United States filed notice of appeal from the judgment of dismissal and remand entered March 6, 1945, and sought to have the district court stay its order of remand. The district court refused to grant that relief but on motion of the Government the circuit court of appeals directed that the judgment of remand be stayed pending further order of that court.

On April 28, 1945, the United States filed in the circuit court of appeals an application for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate the judgment entered March 6, 1945, in the *Peter Micco* case (Certificate, p. 3). On May 17, 1945, the respondent answered seeking dismissal of the Government's application on the ground that the order of remand was not reviewable by appeal or by mandamus.

The application was heard by the circuit court of appeals *en banc*, four judges sitting. Two questions were presented (Certificate, p. 3):

> 1. Whether the circuit court of appeals may by mandamus review the judgment of the United States district court ordering the remand of the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma;
>
> 2. Whether the *Peter Micco* case was within the ambit of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, so that upon removal pursuant to that section the federal district court had jurisdiction to determine who are the heirs of the intestate and what part of his property is restricted.

On September 7, 1945, the circuit court of appeals certified one questions to this Court, the question of reviewability by mandamus but in its certificate stated it was equally divided as to both questions (Certificate, p. 3) and requested this Court to order up the entire record and to decide the whole case (Certificate, p. 4). On December 17, 1945, the Government filed its motion in this Court seeking to have the entire record and cause brought up on the grounds (1) that the judges of the circuit court of appeals were equally divided on the two questions in controversy (2) that if the single question certified were answered by this Court in the affirmative the Government would in effect be denied review

on account of the equal division of the judges of the circuit court of appeals on the remaining question, that is, whether the *Peter Micco* proceeding is removable to the federal district court, and (3) that both questions are of great importance and that the decision of the district court would have a far-reaching effect on land titles in Oklahoma. On January 2, 1946, this Court entered its order postponing further consideration of the motion until the hearing on the certificate with permission to counsel to direct their argument to the question of the power of the Court to grant the relief sought by the motion.

SUMMARY OF ARGUMENT

I. The Court has the power to order up the entire record and decide the whole controversy pursuant to section 239 of the Judicial Code, as amended, 28 U. S. C. 346 (Appendix, pp. 48–49). The only possible objection is that for the Court to do so would be to exercise original jurisdiction not granted by Article III, sec. 2, cl. 2 of the Constitution. This objection is without merit. The appellate jurisdiction of the court below was invoked. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; *McClellan* v. *Carland*, 217 U. S. 268, 280; cf. *United States* v. *Mayer*, 235 U. S. 55, 65–66. If the Government had applied to this Court for the writ, it would have been within the power of the Court to issue the writ in aid of its appellate jurisdiction. *Ex parte United States*, 287 U. S.

241, 245–249. It is this same appellate power which is invoked by the Government's motion.

II. The judgment of the district court remanding the *Peter Micco* case is reviewable. It may be reviewable on appeal. There are considerations which support the view that as to the United States the judgment of remand in the *Peter Micco* case is a "final decision." The judgment defeats the Government's right under section 3 of the 1926 Act to remove, intervene and participate in the *Peter Micco* case and is a final determination of the right of the United States to secure in that case the relief essential to the proper exercise of the governmental interest in the protection of its Indian wards. Cf. *Stevens* v. *Nave-M'Cord Mercantile Co.*, 150 Fed. 71, 73 (C. C. A. 8). If the judgment of remand is not reviewable on appeal it is reviewable by mandamus.

In the absence of statutory prohibition, mandamus will lie to compel a district court to proceed with a case it has ordered remanded to the state court. *Railroad Company* v. *Wiswall*, 23 Wall. 507. *In re Pennsylvania Co.*, 137 U. S. 451, 453. The Act of April 12, 1926, c. 115, 44 Stat. 239, (Appendix, pp. 49–51) contains no prohibition against review of orders remanding cases removed under section 3 of that act and there is no reason to import the prohibition against review contained in the Judiciary Act of March 3, 1887, c. 373, sec. 2, 24 Stat. 552, 553, which has been substantially embodied into section 28 of the Judicial Code, 28

U. S. C. 71, (Appendix, pp. 46–48). The general purpose of the 1887 Act was to reduce the volume of business in the federal courts by contracting the jurisdiction of those courts over private suitors—not the United States. The provision for the removal of cases to the federal courts was concerned with private defendants. The prohibition against review related to private litigants only and was not and could not have been directed at the United States. By contrast, section 3 of the 1926 Act provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting allotted land of Indians of the Five Civilized Tribes. *United States* v. *Hellard*, 322 U. S. 363. Where notice is served, the United States is given the exclusive right to remove the cause to the federal court. Where a case is remanded, only the Government can seek review. Section 3 has no relation by purpose or text to section 28 of the Judicial Code. The mischief the prohibition against review was intended to remedy does not exist under section 3 but on the contrary there is reason to permit review since the Government represents the public interest in cases arising under the 1926 Act. *Heckman* v. *United States*, 224 U. S. 413, 437–438. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554.

Even if the prohibition against review be regarded as extending to cases under section 3, it

does not apply to the United States since the Government is not to be deprived of a prerogative, right, benefit or remedy by the general terms of a statute which does not expressly include the United States. *United States* v. *Stevenson*, 215 U. S. 190, 197; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554; *United States* v. *Herron*, 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650; *United States* v. *Greene*, 26 Fed. Cas. No. 15258 at 33, 34 (C. C. Me.). *See Board of Com'rs of Pawnee County* v. *United States*, 139 F. 2d 248, 250 (C. C. A. 10), certiorari denied, 321 U. S. 795.

III. The *Peter Micco* case is removable under section 3 of the 1926 Act. It satisfies the requisites of the statute (1) as to "suit"; cf. *Ex Parte Milligan*, 4 Wall. 2, 113; cf. *Tutun* v. *United States*, 270 U. S. 568, 577; (2) as to parties; *Merrell* v. *United States*, 140 F. 2d 602, 604 (C. C. A. 10); *In re Micco's Estate*, 59 F. Supp. 434, 435 (E. D. Okla.); *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692; and (3) as to the nature of the claim. Indians claiming to be heirs of Peter Micco are claiming "title to or an interest" in the restricted property of the decedent. *White House Lumber Co.* v. *Howard*, 142 Okla. 163, 165 (1930); *Wells* v. *Helms*, 105 F. 2d 402 (C. C. A. 10); see *In re Thompson's Estate*, 179 Okla. 240,

243 (1937); *Homer* v. *Lester*, 95 Okla. 284, 289 (1923).

A contested proceeding for the probate of a will is removable under section 3. *Caesar* v. *Burgess*, 103 F. 2d 503, 507 (C. C. A. 10). A contest is present in the *Peter Micco* case but is not necessary. *Ex parte Milligan*, *supra*; *Tatun* v. *United States*, *supra*. There is no controlling distinction between a proceeding where the Indian died testate as in the *Burgess* case and one where the Indian died intestate as in the *Peter Micco* case. In one the will acts as an alienation; in the other, the property passes by force of the law of succession.

The district court's holding in the *Peter Micco* case (1) would defeat the purpose of section 3 to enable litigants claiming an interest in allotted lands to bind the United States by the results of litigation, *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Exico*, 115 F. 2d 389, 392 (C. C. A. 10); *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692; *House* v. *United States*, 144 F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781, (2) would permit relitigation of identical issues, the very mischief Congress sought to remedy by section 3; and (3) would practically negate section 3 by permitting the removal of partition suits only.

IV. The decision in the *Peter Micco* case is a departure from existing law in the Eastern Dis-

trict of Oklahoma and is in conflict with the law in the Northern District of Oklahoma, the only other district dealing with the property rights of deceased Indians of the Five Civilized Tribes. It is the sole decision rendered during the life of the statute holding that a federal court is without jurisdiction of a proceeding such as the *Peter Micco* case upon removal under section 3. In reliance on the established law, title rights have vested in hundreds of cases. If the *Peter Micco* decision stands, those rights would be subject to attack, doubt would be cast on the validity of numerous titles, and property rights would be unsettled.

ARGUMENT

I

THE COURT HAS POWER TO ORDER UP THE ENTIRE RECORD AND DECIDE THE WHOLE CONTROVERSY PURSUANT TO SECTION 239 OF THE JUDICIAL CODE, AS AMENDED, 28 U. S. C. 346.

This proceeding originated in the circuit court of appeals on application for leave to file a petition for a writ of mandamus in aid of the court's appellate jurisdiction over the *Peter Micco* case. Both that action and this are "cases." There is therefore clear statutory authority under section 239 for this Court to order up the entire record and decide the whole controversy. The only possible objection is that for this Court to do so would be to exercise original jurisdiction not granted to the Court by Article III, sec. 2, cl. 2

of the Constitution. Cf. *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, 576; cf. *B. & O. R. R.* v. *Interstate Comm. Comm.*, 215 U. S. 216. That the objection is without merit may be demonstrated in two ways.

First, the jurisdiction of the circuit court of appeals in this case is founded on the "all writs" statute. Section 262 of the Judicial Code, 28 U. S. C. 377. That section empowers the circuit court of appeals to issue a writ of mandamus in aid of its appellate jurisdiction over the *Peter Micco* case. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; *McClellan* v. *Carland*, 217 U. S. 268, 280. Thus, even though the proceeding is in form an original one in the circuit court of appeals, it in fact invokes the appellate jurisdiction of that court. Since the case was an appellate one in the court below, it follows that a disposal of the same cause by this Court would simply be an exercise of appellate, not original, jurisdiction. Cf. *United States* v. *Mayer*, 235 U. S. 55, 65–66.

Second, if the Government had applied to this Court instead of to the circuit court of appeals for a writ of mandamus, it would have been within the power of this Court to issue the writ in aid of its ultimate power to review the *Peter Micco* case by certiorari to the circuit court of appeals. *Ex parte United States*, 287 U. S. 241, 245–249. This is true even though the circuit court of appeals would have been completely by-

passed. The Court simply would be exercising its appellate power. It is this same appellate power, not the Court's original jurisdiction, which is invoked by the Government's motion to bring up and dispose of the entire cause.

II

THE JUDGMENT OF THE DISTRICT COURT REMANDING THE PETER MICCO CASE TO THE STATE COURT IS REVIEWABLE

A. THE JUDGMENT OF REMAND MAY BE REVIEWABLE ON APPEAL

As a general rule mandamus will lie only when there is no other adequate remedy. *In re Pennsylvania Co.*, 137 U. S. 451, 453. It follows that if the judgment remanding the *Peter Micco* case is reviewable on appeal, mandamus will not lie. With respect to cases removed under the general removal act (section 28 of the Judicial Code, 28 U. S. C. 71, and its predecessor enactments) an order of a federal court remanding a cause to the state court cannot be reexamined on appeal because it is not a "final decision" within the meaning of the controlling statute, section 128, Judicial Code, 28 U. S. C. 225. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453; *Gay* v. *Ruff*, 292 U. S. 25, 28, fn. 3; *Employers Corp.* v. *Bryant*, 299 U. S. 374, 378. Remands in such cases neither conclude nor dispose of any of the rights of the litigants. The parties and their causes simply are returned

to the state tribunals with their rights unaffected. The same thing may be true with respect to the private litigants in the *Peter Micco* case. The remand would simply relegate them to the state court for adjudication of their property rights. But a different situation prevails with respect to the effect on the United States of a judgment such as the one entered in the *Peter Micco* case, remanding a suit removed under section 3 of the 1926 Act. To preserve the public interest in the affairs of Five Tribes Indians (cf. *Heckman* v. *United States*, 224 U. S. 413, 437–438), Congress by section 3 has provided a means of concluding the interests of the United States in cases affecting property of Five Tribes Indians and has conferred on the United States the right to remove such suits to the federal court and to intervene and participate in these proceedings. These circumstances give rise to considerations which support the view that so far as the United States is concerned the district court's judgment of remand in the *Peter Micco* case is a "final decision." That judgment not only remands the proceedings but is an adjudication that the *Peter Micco* case is not within the scope of section 3. To that extent the judgment effectively bars the United States from representing in that lawsuit the public interest in the rights of the Government's Indian wards. Since the judgment of remand cuts off the Government's right to remove

and to intervene and participate in the case, it is a final determination of the right of the United States to secure in that case the relief essential to the proper exercise of the governmental interest. Cf. *Stevens* v. *Nave-M'Cord Mercantile Co.*, 150 Fed. 71, 73 (C. C. A. 8). If the judgment of remand in the *Peter Micco* case is appealable,[2] the certified question should be answered "No." The Government's rights are protected since an appeal from that judgment was perfected, the appeal was consolidated for argument with the mandamus proceeding and was submitted to the court below.

B. IF THE JUDGMENT OF REMAND IS NOT APPEALABLE, IT IS REVIEWABLE BY MANDAMUS

In the absence of a statutory prohibition mandamus will lie to compel a district court to proceed with a case it has incorrectly ordered remanded to the state court. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453. Section 3 of the Act of 1926 contains no prohibition against review of orders of remand.[3] It is silent in that respect. It is true that review whether by appeal or mandamus of orders remanding cases removed under the

[2] The Government's contention that the prohibition against review contained in the general removal act does not bar review of orders remanding cases removed under section 3 is discussed in connection with the question of reviewability by mandamus at pp. 16–26, *infra*.

[3] For full text, see Appendix, pp. 49–51.

general removal act was forbidden by the Judiciary Act of March 3, 1887, c. 373, sec. 2, 24 Stat. 552, 553 which has been substantially embodied into section 28 of the Judicial Code, 28 U. S. C. sec. 71.[1] *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Gay* v. *Ruff*, 292 U. S. 25, 29. But the prohibition against review contained in section 28 of the Judicial Code does not extend to orders remanding cases removed under section 3 of the 1926 Act for two reasons. First, the 1926 Act contains no prohibition against review of orders of remand and it supplies no reason for importing into its text the prohibition contained in the Judicial Code. Second, in any event, the prohibition against review does not apply to the United States.

1. *The 1926 Act contains no prohibition against review of orders of remand and supplies no reason for importing the prohibition from section 28 of the Judicial Code.*

As already pointed out, the 1926 Act contains no ban against review of orders of remand. In addition, a comparison of the objectives of Section 28 of the Judicial Code with the objectives of the 1926 Act and a comparison of the mischiefs the two acts were intended to remedy make it clear that no justification exists for extending the prohibition of section 28 to section 3 of the 1926

[1] For full text, see Appendix, pp. 46–48.

Act so as to prevent the review of orders remanding cases removed by the United States under section 3.

a. *The United States does not fall within the reason of section 28 of the Judicial Code*

Section 28 stems from the Act of 1887, which was a complete Judiciary Act. It restated the existing law defining the jurisdiction of the circuit (district) courts along with a number of new amendments. The general purpose of the 1887 Act so far as it altered then existing law was to reduce the volume of business in the federal courts by contracting the jurisdiction of those courts. This was accomplished primarily by raising the jurisdictional requirement of the sum or value in controversy from $500 to $2,000 both in cases originating in the federal courts and in cases removable from the state courts. Obviously this was aimed at private suitors since the jurisdiction of the courts over actions brought by the United

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The legislative history of the 1887 Act is not helpful. The prohibition against review was not contained in the bill as passed by the House. H. R. No. 2441, 49th Cong., 2d sess. (1887). It was inserted by the Senate Committee on the Judiciary, 18 Cong. Rec., pt. 3, pp. 2542–2543 (1887). There were no committee reports and this portion of the bill was not discussed during the debate. 18 Cong. Rec., pt. 3, pp. 2542–2546 (1887). This Court, however, has defined the purpose of the act as stated in the text. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Employers Corp. v. Bryant*, 299 U. S. 374, 379.

States has never depended upon the amount involved.

Section 1 of the Act defined the original jurisdiction of the circuit (district) courts. It did not diminish or in any way affect the jurisdiction which had theretofore existed in actions brought by the United States. Congress was not undertaking to contract the jurisdiction of the federal courts as to cases in which the United States was the plaintiff. The traditional right of the United States to sue in its own courts was left untouched.

Section 2 of the 1887 Act contained the prohibition against review. It dealt with the removal of cases and provided that suits "* * * may be removed by the defendant or defendants * * *." This removal statute was not available to the United States —— it could not have been. Only *defendants* could remove. The United States could not be a defendant in a state court since it had not consented to be sued. *Stanley* v. *Schwalby*, 162 U. S. 255, 270. Since only a defendant could be in a position to seek review of an order of remand, it follows that the prohibition against review of orders of remand was not aimed at the United States. The prohibition against review related to private litigants only. Under the 1887 Act the situation where the Government might seek such review simply could not arise. The Government did not and could not fall within the reason for the prohibition of review of orders remanding causes.

b. Section 3 of the 1926 Act is unrelated to and independent of Section 28 of the Judicial Code

Thirty-nine years after the 1887 Act Congress enacted the Act of April 12, 1926. Section 3 of that act provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting the land of Indians of the Five Civilized Tribes or the profits, issues, rents, and proceeds derived therefrom. *United States* v. *Hellard*, 322 U. S. 363, 364. Where notice is served, the United States is given the right to intervene in the state court or at its option to remove the cause to the federal court and there intervene. A prime purpose of section 3 was to settle Oklahoma land titles. Prior to its enactment the United States could not be bound to a proceeding affecting restricted property of Indians of the Five Civilized Tribes. If dissatisfied with the outcome of a proceeding, the United States was free to institute an independent suit and to obtain a fresh decree. *Sunderland* v. *United States*, 266 U. S. 226, 232. So long as the Government could not be sued, litigants could never be certain whether the title to Indian land was merchantable. To cure that situation section 3 was enacted. H. Rep. No. 322, 69th Cong., 1st sess. (1926); Sen. Rep. No. 317, 69th Cong., 1st sess. (1926); *Caesar* v. *Burgess*, 103 F. 2d 503, 506 (C. C. A. 10); *House* v. *United States*, 144

F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781.

In short, section 3 is an independent enactment confined to Oklahoma, designed for a special purpose relating to the Government's interests in Five Tribes lands and correspondingly limited as to parties and subject matter. Neither by purpose nor by text is it related to the 1887 Act as embodied in section 28 of the Judicial Code. On the contrary, contradistinguished from section 28, section 3 of the 1926 Act enlarged the jurisdiction of the federal courts in Oklahoma on removal to embrace a class of cases of which those courts otherwise would not have cognizance. In addition, whereas section 28 confers the right of removal on all "defendants," section 3 gave that right to the United States exclusively. In submitting the rights of the United States to binding adjudication, Congress in section 3 carefully preserved to the United States the right of litigating in its own courts. It gave the Government, and it alone, "the right," where notice was served, to remove a suit to the federal district court. It follows that where such a case is remanded, the Government alone can seek review. It seems fair to conclude that Congress intended that if the United States is to be bound by a cause instituted by another, then at least it should have a right to have that cause heard and determined by its own courts, and this includes rights and privileges of review.

The Government represents the public interest in cases arising under the 1926 Act. *Heckman* v. *United States*, 224 U. S. 413, 437–438. In such cases Congress should not be charged with an intent to limit the reviewing powers of the federal appellate courts. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554. This is particularly apparent when it is considered (1) that the 1926 Act contains no prohibition against review of orders of remand; (2) that to limit the powers of review the Court would be compelled to import into the 1926 Act from a statute enacted 39 years before a prohibition directed only at private litigants and not the United States, and (3) that the mischief the prohibition was intended to remedy does not exist under the 1926 Act but, on the contrary, reasons for granting the review to the sovereign do exist.

2. *The prohibition against review in Section 28 does not apply to the United States*

Even if section 3 be treated as legislation of a fragmentary nature to be harmonized with Section 28 of the Judicial Code,[8] the bar of review contained in Section 28 does not apply to the United

[8] In *United States* v. *Fixico*, 115 F. 2d 389, the court below so construed section 3 and held the prohibition against review extended to cases under section 3. It should be pointed out that in the *Fixico* case the Government did not advance and the court did not consider the proposition that the prohibition does not apply to the United States.

States since the Government is not to be deprived of a prerogative, right, benefit, or remedy by the general terms of a statute which does not expressly include the United States. *United States* v. *Stevenson,* 215 U. S. 190, 197; *United States* v. *American Bell Telephone Co.;* 159 U. S. 548, 554; *United States* v. *Herron,* 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239; *City of Springfield* v. *United States,* 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650; *United States* v. *Greene,* 26 Fed. Cas. No. 15258 at 33, 34 (C. C. Me.). See *Board of Com'rs of Pawnee County* v. *United States,* 139 F. 2d 248, 250 (C. C. A. 10), certiorari denied, 321 U. S. 795.

In the *American Bell Telephone* case, the statute (Act of March 3, 1891, c. 517, sec. 6, 26 Stat. 826, 828) provided that the judgments of the circuit courts of appeals shall be "final" "in all cases arising under the patent laws." From an adverse holding by a circuit court of appeals in an action to cancel a patent for an invention, the United States appealed to this Court. The Telephone Company moved to dismiss on the ground that the judgment of the circuit court of appeals was final and no appeal would lie. This Court examined the objectives of the Act of 1891 and explained that its purpose was to transfer a large part of the Supreme Court's appellate jurisdiction to the newly created circuit courts of appeals;

that as a means of relieving the Supreme Court of part of its burden, Congress cut off the right of appeal to the Supreme Court in actions brought by private litigants to vindicate rights under the patent laws by making the judgments of the circuit courts of appeals "final" "in all cases arising under the patent laws." But the Court declared there was nothing in that objective "which furnished foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction" of the Court in a case where the United States was the appellant (p. 554). The Court cited the case of *Dollar Savings Bank* v. *United States*, 19 Wall. 227, and confirmed the principle there laid down that the rights of the sovereign are not diminished by a statute which does not expressly include the Government. It concluded (p. 555):

> We cannot impute to Congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such; deeply concerning the public interests; and not falling within the reason of the limitations of the act.

The case of *City of Springfield* v. *United States*, 99 F. 2d 860 (C. C. A. 1), certiorari denied, 306 U. S. 650, presents another striking illustration of the principle. That was an action to enjoin the imposition of state taxes on federal property.

The City of Springfield asserted that the federal court was without jurisdiction by virtue of section 24 (1) of the Judicial Code (28 U. S. C. 41 (1)) providing that "no district court shall have jurisdiction of any suit" to prevent the assessment or collection of taxes imposed under state law where a plain, speedy, and efficient remedy may be had in the courts of the state. The circuit court of appeals concluded that a plain, speedy, and efficient remedy was not available under the state law but it did not stop there. In addition, as a separate ground of decision, it held (p. 862) "* * *, it does not appear that the amendment to Sec. 24 applied to the United States, since it is not specifically included therein. *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80."

The application of the principle is well demonstrated in the old case of *United States v. Greene*, 26 Fed. Cas. No. 15258 (C. C. Me.) where the United States sued as assignee of a promissory note given by the defendants. The defendants pleaded that they and the payee were citizens of the same state and therefore the court was without jurisdiction since the Judiciary Act provided "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, * * * in favor of an assignee, unless such suit might have been prosecuted in such court * * * if no assignment had been made." The district court sustained the

plea to its jurisdiction. On appeal to the circuit court Justice Story held the district court had jurisdiction. He pointed out that the mischief to be remedied by the provision of the Judiciary Act was imposition on the jurisdiction of the federal courts by the assignment of negotiable instruments in order to create diversity of citizenship. The case brought by the Government of course was not within the mischief. Justice Story applied the principle of statutory construction that legislative acts do not "embrace the sovereign power or government, unless expressly named or included by necessary implication" (p. 34) and concluded that even though the broad language of the Judiciary Act taken literally embraced all cases of the class it did not extend to suits brought by the sovereign.

On the principle of the *American Bell Telephone Co.* case and like decisions, if a suit could conceivably arise under the 1887 Act in which the United States might seek review of an order of remand, the prohibition contained in that act would not bar this Court from granting review to the sovereign. *A fortiori* the prohibition cannot possibly be extended to bar either this Court or the court below from granting review to the Government in cases arising under a much later independent statute enacted for a purpose entirely unrelated to the 1887 Act.

III

A PROCEEDING WHICH MAY RESULT IN A DECREE DETERMINING THE RESTRICTED INDIAN HEIRS OF A RESTRICTED ALLOTTEE AND DETERMINING THEIR RIGHTS TO THE RESTRICTED ESTATE OF THE DECEDENT IS REMOVABLE UNDER SECTION 3 OF THE ACT OF 1926.[7]

The Government does not seek to compel administration of the unrestricted estate in the district court. Apparently the respondent misapprehended the Government's position. *In re Micco's Estate*, 59 F. Supp. 434, 435–436. At the trial court's request the Government briefed the question of whether the court may exercise complete probate jurisdiction (*id.* p. 435), concluding, as should in all fairness be noted here, that the court did have such jurisdiction, but specifically stating (p. 11) that—

> However, since no court, either state or federal, acquires jurisdiction to administer the restricted property comprising the estate, it is, as a matter of fact, immaterial to the Government whether that part of the proceedings which relates solely to the disposition of the unrestricted estate remains in the federal court or is remanded to the state court. The Government's main concern is with the protection of the restricted property and with the protection of the rights of the restricted Indian heirs in the estate. * * *

[7] This question is discussed in the event the Court should decide to dispose of the whole controversy.

The United States does not seek administration of the unrestricted estate. Its demands are clearly specified in its complaint in intervention. Its interest is limited to a determination of heirs—since that determination fixes the rights of the Indians to restricted property—and to the determination of which property is restricted. There is no governmental interest in the unrestricted assets subject to the control of the administrator. For that reason it is immaterial to the Government whether the federal court retains the entire proceeding—as is the present practice in the Northern District of Oklahoma, or whether it follows what is probably the more expedient plan of reserving jurisdiction to determine heirs and remanding the remainder of the case for administration as was done in the case entitled *In re Estate of Jackson Barnett,* No. 4556 Eq. (E. D. Okla.).[8] It is, however, very material to the Government that so much of the proceeding as results in a determination of the ultimate rights of restricted Indian heirs in restricted property be held to fall within the scope of section 3 of the 1926 Act.

Section 3 provides that by service of notice upon the Superintendent for the Five Civilized Tribes the United States may be bound to a "suit" "to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs * * *

[8] The unreported opinion is set out in the Appendix, pp. 51–65.

of such Indian are parties, as plaintiff, defendant or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same * * *." Section 3 also confers on the United States "the right to remove any such suit" to the United States district court and upon removal the federal district court is given jurisdiction "to hear and determine said suit."

The *Peter Micco* case originated in the county court by the filing of a petition for the appointment of an administrator. Since the intestate died seized of unrestricted as well as restricted property the general jurisdiction of the county court was invoked. 58 Okla. Stats. Ann. secs. 631–634. Under those sections the probate courts of Oklahoma have jurisdiction to determine heirship as an incident to final distribution. By force of the Act of June 14, 1918, c. 101, sec. 1, 40 Stat. 606, complemented by Chap. 25 Okla. Laws 1919 (84 Okla. Stats. Ann. secs. 251–256) the jurisdiction to determine heirship extends not only to the unrestricted property but to the restricted property as well. *Hardridge* v. *Hardridge*, 168 Okla. 7, 13 (1934); *Moore* v. *Jefferson*, 190 Okla. 67, 70 (1942).

The essential question is whether such a proceeding falls within the ambit of section 3 of the 1926 Act. The court below has described the scope of

the section as "broad." *United States* v. *Fixico*, 115 F. 2d 389, 393. "It is not confined to cases in which title to land is involved. It extends to any case in which any other interest in restricted land is in issue. It must be presumed that the Congress chose that broad language with deliberation and studied purpose. And any cause fairly within the reach of the section may be removed under its provisions." *Id.* p. 392.

To be within the purview of section 3, the *Peter Micco* case must be (1) a "suit" (2) to which the restricted heirs of a restricted member of the Five Civilized Tribes are parties (3) claiming or entitled to claim title to or an interest in allotted lands or the proceeds, issues, rents, and profits derived from those lands. If those three elements are present, the case is removable and the federal court has jurisdiction.

A. THE THREE REQUISITES OF SECTION 3 ARE SATISFIED

1. The requisite as to "suit" is satisfied

The term "suit" was broadly defined in *Weston* v. *The City Council of Charleston*, 2 Pet. 449, 464, where Chief Justice Marshall stated:

> The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in

a court of justice, the proceeding by which the decision of the court is sought is a suit.

a. *The laws of Oklahoma afford a court of justice and a mode of procedure for establishing a right of heirship.*

The laws of Oklahoma afford a court of justice—the county court—and a mode of procedure for establishing a right of heirship. The county court is created by the State Constitution, Art. VII, sec. 11. It has probate jurisdiction. 58 Okla. Stats. Ann. sec. 1. It is a court of record. Oklahoma Constitution, Art. VII, sec. 11; *Petroleum Auditors Assn. v. Landis*, 182 Okla. 297, 298–299 (1938). All issues of fact joined in the county court must be tried in that court. The court makes written findings and conclusions, enters judgments and enforces them as in civil actions generally. 58 Okla. Stats. Ann. sec. 709. The proceedings, records, and judgments of the county court are accorded the same dignity, force, and effect as those of the state district courts. 58 Okla. Stats. Ann. sec. 2; *In re Green's Estate*, 80 Okla. 256 (1921); *Petroleum Auditors Assn. v. Landis, supra*, p. 299. Heirship may be determined as an incident to distribution, 58 Okla. Stats. Ann. sec. 631, or under the special statutory method. 84 Okla. Stats. Ann. 251–256. Under either procedure the court must render a decree determining the heirs. 58 Okla. Stats. Ann. sec. 632, 84 Okla. Stats. Ann. sec. 254. An appeal will lie. 58 Okla. Stats. Ann. sec. 721, 84 Okla. Stats. Ann. sec. 255.

b. *A contest is present but none is necessary to have a "suit"*

At the time the *Peter Micco* case was removed there was a contest pending created by the United States Probate Attorney's motion to dismiss, filed in behalf of some of the Indian heirs apparent. In addition, the county court had undertaken a preliminary determination of heirs in a proceeding of which no notice of any kind had been given. This was done at a so-called "hearing" held four days prior to the date on which it had been duly scheduled. *Merrell v. United States*, 140 F. 2d 602, 605 (C. C. A. 10). Of course, failure to notify interested parties cut off any potential contest, but no such unorthodox procedure prevails to smother a "suit."

In any event, the law is clear that to have a "suit," as, for instance, in an action to quiet title against unknown parties, there need not be active adversary parties. When the petition for administration was filed the judicial process was invoked looking towards a decree of distribution and a determination of heirs. 58 Okla. Stats. Ann. sec. 631. Embraced in that petition was the right of the restricted Indians there named to have their status as heirs established. These heirs were present as constructive parties. Cf. *Walker v. Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692. When the petition was filed there was a "suit"—the suit of the petitioner and the suit of the heirs whose

interests he purported to represent. Cf. *Ex Parte Milligan*, 4 Wall. 2, 113. In the *Milligan* case speaking of an application for a writ of habeas corpus this Court said (p. 113):

> When the petition is filed and the writ prayed for, it is a *suit*,—the suit of the party making the application.

Cf. *Tutun* v. *United States*, 270 U. S. 568, 577, where an unopposed petition for naturalization was held to be a "case" within the meaning of the Circuit Courts of Appeals Act of March 3, 1891, c. 517, sec. 6, 26 Stat. 826, 828. Hence, we submit, the proceeding initiated in the county court by the petition for administration satisfies the requisite of section 3 as to "suit."

2. *The requisite as to parties is satisfied*

Admittedly, at the time of removal the proceedings had not reached the stage where the parties were denominated "plaintiff, defendant or intervenor."[9] As used in section 3 that phrase manifestly is merely descriptive. Certainly no serious consideration would be given to the contention that by labeling parties "petitioner," "complainant" or "respondent" a proper suit could be placed outside the operation of section 3.

[9] Under the Oklahoma Code "All issues of fact joined in the county court must be tried by said court, and in all such proceedings, the party affirming is *plaintiff*, and the one denying or avoiding is defendant." 58 Okla. Stats. Ann. sec. 709. [Italics supplied.]

The test is whether the party is pursuing a remedy or asserting a right which might be pursued or asserted by one in the position ordinarily occupied by a plaintiff, defendant or intervenor. So understood, the phrase "plaintiff, defendant or intervenor" probably embraces the entire gamut of parties litigant. Thus the circuit court of appeals has held that an action against the administrator of an Indian's estate where none of the formal parties were Indians was a "suit" within section 3. The court held that since the interests of the restricted Indian heirs would be bound by any judgment rendered in favor of the plaintiff those heirs were constructively present as parties. *Walker* v. *Spincer*, 123 F. 2d 347, 349, certiorari denied 316 U. S. 692.

We submit that the *Peter Micco* case satisfies the requisite of section 3 as to parties since restricted Indians of the Five Civilized Tribes are claiming restricted property as heirs of a restricted member of the Five Civilized Tribes. *Merrell* v. *United States*, 140 F. 2d 502, 504 (C. C. A. 10); *In re Micco's Estate*, 59 F. Supp. 434, 435 (E. D. Okla.).

3. *The requisite as to the nature of the claims satisfied*

Section 3 requires that the suit be one in which the restricted heirs are "claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the pro-

ceeds, issues, rents and profits" derived from those lands. As already pointed out, *supra*, pp. 32–33, the initiation of proceedings by the filing of a petition for the appointment of an administrator invoked the jurisdiction of the county court to make a final determination of heirship for the purpose of determining who is entitled to the restricted assets. The determination of heirship fixes the right of the heirs to inherit in the estate. *White House Lumber Co.* v. *Haywood*, 142 Okla. 163, 165 (1930). The county court's finding as to heirship even when made incidental to the distribution is *res judicata* as to the heirs, the legatees, devisees or heirs and heirs of heirs claiming or claiming for a share in the estate. *Wells* v. *Helms*, 105 F. 2d 102 (C. C. A. 10); *In re Thompson's Estate*, 179 Okla. 240, 243 (1937).

In other words, in the *Pratt, Mecom* case the rights of restricted Indians to restricted property depend on the determination of whether they are heirs of the decedent. Indians in that situation are claiming title to or an interest in restricted

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In that case the Supreme Court of Oklahoma stated (p. 165): "The probate procedure of the state controls the manner of passing of the title to the real estate and the heir is dependent for his title, not only upon the statutes of succession * * * but upon the probate procedure for the determination and distribution thereof."

Of course the chief cases were not concerned with the question of whether the United States is bound to such a proceeding in the absence of notice under section 3. *Anderson* v. *Pack*, 53 F. 2d 257 (C. A. 10, Okla.) (all on other grounds *Roberts* v. *Anderson*, 66 F. 2d 854 (C. C. A. 10).

property. In fact they are claiming ownership of such property. It may be that the only direct issue is the determination of their status as heirs. But there can be no doubt of the issue at stake. The Indians seek the determination of their status as heirs to obtain a binding adjudication which will be incontestable evidence of their ownership of property. The Supreme Court of Oklahoma expressed this manifest conclusion in *Homer* v. *Lester*, 95 Okla. 284 (1923), where the court stated (p. 289):

> No court can determine that question [who are the heirs] without trying the title to the land. No ingenious reasoning can avoid the plain, obvious conclusion that the answer to the question "who are the heirs of Thomas J. Taylor?" determines whether these defendants are the owners of the land.

B. AS RESPECTS THE REQUISITES OF SECTION 3 THERE IS NO CONTROLLING DIFFERENCE BETWEEN AN HEIRSHIP PROCEEDING AND A CONTESTED WILL CASE

The circuit court of appeals found the requisites of section 3 present in *Caesar* v. *Burgess*, 103 F. 2d 503 where it held (p. 507) that section 3 was "broad enough to authorize the removal of a contested proceeding for the probate of a will executed by a full-blood restricted Creek Indian whose estate consists exclusively of restricted lands, and restricted moneys in the custody of the Secretary of the Interior, devising the whole of such estate to Indian legatees."

Insofar as the applicability of section 3 is concerned, there is no controlling difference between the *Burgess* case where the restricted allottee died testate and this case where the restricted allottee died intestate. In both instances the restricted allottees died seized of restricted property. In both instances the judicial processes of the county court were invoked. In both instances persons claiming to be restricted Indians asserted they were entitled to the property of the decedent and sought establishment of their status as heirs or devisees to the end of obtaining judicial confirmation of their right to the property.

The presence of a will offers no controlling distinction. The ultimate effect of the probate proceeding is the same whether the allottee died testate or intestate. Where a valid will is left it operates as an alienation of restricted property. *Caesar* v. *Burgess*, 103 F. 2d 503, 507 (C. C. A. 10), and cases there cited. Where no will is left the restricted property passes to the heirs by force of the state laws of succession made applicable by the Oklahoma Enabling Act of June 16, 1906, c. 3335, secs. 13, 21, 34 Stat. 267; *Jefferson* v. *Fink*, 247 U. S. 288, 294. There is no difference between the two with respect to ultimate ownership. The fact that in one instance there is a written instrument and in the other a statute does not alter the fact that in both cases there is a judicial confirmation of a transfer of title.

C. THE HOLDINGS OF THE DISTRICT COURT IN THE PETER MICCO CASE ARE CONTRARY TO THE PURPOSE OF SECTION 3

The conclusion of the district court that the *Peter Micco* case does not fall within the purview of section 3 is within neither the letter nor the spirit of that section. The circuit court of appeals consistently has given a liberal construction to the section to carry out the broad general purposes of the statute so as to enable litigants claiming an interest in allotted lands or in the proceeds of such lands to file suits in the state courts, serve notice upon the Superintendent for the Five Civilized Tribes and thus bind the United States by the result of the litigation. *Caesar* v. *Burgess*, 103 F. 2d 503; *United States* v. *Fixico*, 115 F. 2d 389, 392; *Walker* v. *Spencer*, 123 F. 2d 347, 349, certiorari denied, 316 U. S. 692; *House* v. *United States*, 144 F. 2d 555, 559, certiorari denied, 323 U. S. 781; *Butler* v. *Denton*, 150 F. 2d 687, 689.

In the face of those decisions the district court gave an extremely narrow construction to section 3. It concluded that section 3 provides for service of notice only in actions where "the United States is an indispensable party." 59 F. Supp. 434, 440. That holding, we think, is completely erroneous. The Government is an indispensable party only to actions to condemn or partition restricted Indian land where the judicial proceeding itself results in an alienation and the creation of a new title. *Minnesota* v. *United States*, 305

U. S. 382; *United States* v. *Hellard*, 322 U. S. 363. Section 3 was unnecessary to authorize suit against the United States in such cases. Prior to the enactment of section 3 the United States had consented to be sued in proceedings to condemn or to partition restricted Indian land. Act of March 3, 1901, c. 832, sec. 3, 31 Stat. 1083–84, 25 U. S. C 357; Act of June 14, 1918, c. 101, sec. 2, 40 Stat. 606, 25 U. S. C. 355. As a matter of fact the court below has held that actions to condemn restricted Five Tribes land do not fall within the ambit of section 3. *Town of Okemah* v. *United States*, 140 F. 2d 963. It follows that the effect of the district court's conclusion gives no meaning to section 3. Under its interpretation the only cases to which section 3 would apply would be actions to partition restricted Five Tribes land and even before section 3 the United States could be sued in such actions by serving the United States through its Attorney General and United States Attorney. See *United States* v. *Hellard*, 322 U. S. 363, 368–369. More than that the district court's conclusion is in direct conflict with its own prior practice, that of its sister court in the northern district, and the action of the circuit court of appeals in consistently entertaining jurisdiction in dozens of cases removed under section 3 where the United States was merely a proper but not an indispensable party, such as will proceedings, actions to determine

heirs, to cancel conveyances, to foreclose mortgages, to set aside trust agreements, to quiet title, to recover possession, to collect rentals, to recover damages for trespass, and to establish the tax immunity of restricted property. See, e. g., *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Lee*, 108 F. 2d 936 (C. C. A. 10); *United States* v. *Fixico*, 115 F. 2d 389 (C. C. A. 10); *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *Walker* v. *Spencer*, 123 F. 2d 347 (C. C. A. 10), certiorari denied, 316 U. S. 692; *United States* v. *Williams*, 139 F. 2d 83 (C. C. A. 10), certiorari denied, 322 U. S. 727; *United States* v. *Anglin & Stevenson* (C. C. A. 10), 145 F. 2d 622, certiorari denied, 324 U. S. 844.

The holding of the district court that section 3 applies only to cases where the United States is an indispensable party and the holding that the county courts proceedings did not constitute a "suit" within section 3, demonstrate the results of a narrow construction of that section. Thus the district court was compelled to the conclusion that the way now was open for the United States to institute an original action to determine who are the heirs and what property is restricted, 59 F. Supp. 434, 441. The relitigation of identical issues, which the district court conceived to be the correct procedure, is exactly the sort of mischief Congress sought to remedy by section 3 of the 1926 Act. There can be no

certainty of titles or of rights in lands allotted to Indians of the Five Civilized Tribes so long as the United States cannot be bound in a single action. If the district court is correct, the only cases removable under that section would be partition suits. *United States* v. *Hellard*, 322 U. S. 363. Tested by the consequences of the district court's holding, it is evident that if the decision in the *Peter Micco* case stands, the purpose of section 3 will be defeated and the statute negated.

IV

THE DECISION IN THE PETER MICCO CASE IS A DEPARTURE FROM ESTABLISHED LAW AND CREATES DOUBT AS TO THE VALIDITY OF NUMEROUS TITLES AND PROPERTY RIGHTS

Ever since the enactment of section 3 notices of pendency have been served in proceedings seeking the determination of heirs. So far as the Government is aware the judgment in the *Peter Micco* case is the lone decision rendered during the 20-year period since the 1926 Act holding the federal court is without jurisdiction of such a proceeding upon removal under section 3. The action of the district court in *Merrell* v. *United States*, 140 F. 2d 602 (C. C. A. 10) removes all doubt as to the law in the Northern District of Oklahoma. Over eleven years ago Circuit Judge Williams, now retired, then district judge for the Eastern District of Oklahoma, wrote an exhaus-

tive opinion overruling a motion to remand and holding that section 3 embraced a proceeding on all fours with the *Peter Micco* case. *In re Estate of Jackson Barnett,* No. 4556 Eq. (unreported opinion filed in 1934).[12] There had been no departure from that holding prior to the *Peter Micco* case. The federal court for the Eastern District of Oklahoma entertained jurisdiction and entered final decrees in the last heirship cases considered prior to the *Peter Micco* case.[13]

While the court below has never expressly passed on the exact question, by implication the jurisdiction of the federal courts in heirship proceedings was recognized in *Scott* v. *Beams,* 122 F. 2d 777, certiorari denied, 315 U. S. 809, and in *United States* v. *Anglin & Stevenson,* 145 F. 2d 622, certiorari denied, 324 U. S. 844. The point is

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[12] The text of the opinion is set out in the Appendix, pp. 51–65. That proceeding, like the *Peter Micco* case, originated in the county court by the filing of a petition for administration. Later it was consolidated for trial with two actions to quiet title removed from state district courts. *Scott* v. *Beams*, 122 F. 2d 777, 780 (C. C. A. 10), certiorari denied, 315 U. S. 809.

[13] *In the matter of the Estate of Isaac Houston et al.*, No. 1073 Civil, decree of heirship entered November 5, 1943; *In the Matter of the Estate of Daniel Smith*, Civil No. 953, judgment determining heirs entered April 9, 1943—the proceeding originated by filing a petition for administration in the county court; *In the Matter of the Estate of Watson Palmer*, Civil No. 864, judgment determining heirs entered October 26, 1942, sub. nom. *Emma Palmer et al.* v. *The heirs, etc., of Watson Palmer.*

that in reliance on the established law title rights have vested in hundreds of cases and large amounts of money have been distributed, e. g., *United States* v. *Anglin & Stevenson, supra,* where over $300,000 in attorneys' fees and expenses were paid out, and *Scott* v. *Beams, supra,* where over a million dollars was divided among the heirs.

The effect of the *Peter Micco* decision is to exclude a large class of cases (an average of 200 a year) from the provisions of section 3 and to bar the United States from obtaining review of orders of remand in other classes of cases arising under section 3.[14] If the decision in the *Peter Micco* case stands, notices served in hundreds of heirship cases in which the United States did not appear would be ineffective to bind the Government and the decrees in those cases would be open to attack. Doubt would be cast on the validity of numerous titles, property rights would be unsettled and a great deal of litigation probably would ensue. Further, the decision creates a conflict between the only two federal district

[14] Since the enactment of section 3 the Superintendent for the Five Civilized Tribes has been served with about 6,230 notices. Beginning with 1937 notices have been served in an average of over 600 cases each year. Of these an average of about one-third are heirship proceedings such as the *Peter Micco* case. The number of notices served has increased in almost unbroken progression since 1937. 1926–36, inc.—750 notices served; 1937—345; 1938—371; 1939—505; 1940—597; 1941—616; 1942—770; 1943—746; 1944—749; 1945—781 up to November 15, 1945.

courts dealing with the property rights of deceased Indians of the Five Civilized Tribes since under the law in the northern district of Oklahoma heirship proceedings are within the scope of section 3.

In these circumstances it is believed that this Court should review the novel construction placed upon section 3 by the respondent. Aside from the decision in the *Peter Micco* case the construction sought by the Government is in conformity with the established law of the two districts and will not jeopardize titles and property rights. The other, the stringent construction adopted in the *Peter Micco* case, is a departure from established law, will unsettle titles and property rights and may lead to a great deal of litigation. In view of these considerations, the effect of the hundreds of decrees rendered in the past sustaining titles and fixing property rights should not be disregarded. Cf. *McDougal* v. *McKay*, 237 U. S. 372, 385; *Doolittle* v. *Bryan*, 14 How. 563, 567.

CONCLUSION

It is submitted that, if the court concludes that the judgment of remand is not appealable, the Government's motion that the Court order up the entire record and decide the whole matter in controversy should be granted and a writ of mandamus issued directing the respondent to vacate the judgment entered March 6, 1945, in the *Peter*

Micco case and to hear and determine that cause upon the issues and the merits.

Respectfully submitted.

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Solicitor General.

J. EDWARD WILLIAMS,
Acting Head, Lands Division,

MARVIN J. SONOSKY,
Attorney.

JANUARY 1946

APPENDIX

Section 2 of the Judiciary Act of March 3, 1887, c. 373, 24 Stat. 552 as embodied into section 28 of the Judicial Code, 28 U. S. C. 71 (Act of March 3, 1911, c. 231, sec. 28, 36 Stat. 1094), provides:

> Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district.

And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said

party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error, from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Section 239 of the Judicial Code as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. C. 346, provides:

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the

same manner as if it had been brought there by writ of error or appeal.

Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, provides:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings

on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record, and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or com-

plaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 4556 Equity.

IN RE ESTATE OF JACKSON BARNETT, DECEASED

On May 21, 1934, Willie Conner and Rebecca J. Baker filed application in the County Court of Muskogee County, State of Oklahoma, by petition for letters of administration upon the estate of Jackson Barnett, deceased, asking that Ferd P. Snider be appointed administrator. By proper order said application was set for hearing on June 14, 1934, at ten A. M. On June 4, 1934, Melviney Ditzler appeared specially and filed objection to the jurisdiction of the court, contending that the jurisdiction rested in the County Court of Okmulgee County, State of Oklahoma. On same date Jimmie (Jimmy) Barnett and Nellie Barnett appeared specially objecting to the jurisdiction in the court, with the contention that the jurisdiction rested in the County Court of Okmulgee County, Oklahoma. John Conner on June 8, 1934, filed a response admitting that Jackson Barnett, deceased, was enrolled as a full blood Creek

Indian, Roll No. 9213; that the heirs set forth in the petition filed herein were correct and all full blood Creek Indians, and he prayed that administration be had as prayed for in said petition; that the heirs mentioned therein be declared and determined to be the sole and only heirs of the said Jackson Barnett, deceased. On June 8, 1934, a purported notice of pendency of suit in said matter was addressed to the Superintendent of the Five Civilized Tribes, notifying him that said cause is pending in the County Court of Muskogee County, Oklahoma, and that said suit involves the estate of Jackson Barnett, deceased, who was a full blood Creek Indian and involves the disposition of the original allotment of the said Jackson Barnett, which is restricted, and also funds in the hands of the Superintendent for the Five Civilized Tribes, which funds are restricted, and that the heirs of the said Jackson Barnett, deceased, are full blood Creek Indians, and that John Conner is a full blood Creek Indian and an heir to said estate. Lewis Fisher, Melvina Ditzler, Annie Beams, Mariah Thompkins, Nellie Barnett and Mahaley Hickman, claiming to be nephews and nieces of the said Jackson Barnett, deceased, and full blood Creek Indians, appeared specially and moved the court to dismiss the petition for letters of administration, 1st, because the court is without jurisdiction to appoint an administrator of said estate, for the reason that Muskogee County was not the residence of Jackson Barnett at the time of his death, nor was it ever the residence of Jackson Barnett; 2nd, that said decedent was abducted from his home in Okmulgee County, Oklahoma, on or about February 23, 1920, by one

Anna Laurie Lowe, and has continually been kept from returning to his said home in Okmulgee County since that date until his death, through the undue influence and connivance of the said Anna Laura Lowe; and that said Jackson Barnett was domiciled and had been a resident for more than forty years preceding his abduction in February, 1920, of Okmulgee County, Oklahoma, and that said county is the county of his residence and the County Court of Okmulgee County, Oklahoma, is the court having jurisdiction to make settlement of the estate of the said Jackson Barnett. On June 11, 1934, the petition of Willie Conner et al. asking for continuance of hearing of petition to appoint administrator and for order resetting same for hearing was filed, and same was granted and the case re-set for hearing on July 16, 1934, at ten o'clock A. M. On July 27, 1934, the United States of America as petitioner, by its solicitor W. F. Rampendahl, United States Attorney for the Eastern District of Oklahoma, and acting on auhority of the Attorney General of the United States, and at the request of the Secretary of the Interior, filed its motion therein for an extension of time in which to file its petition to remove said cause to the United States District Court for the Eastern District of Oklahoma, as provided in Section 3 of the Act of Congress approved April 12, 1926 (44 Stat. 239), entitled: "An Act to Amend Section 9 of the Act of May 27, 1908, * * *" averring that said matter involved restricted allotted lands and restricted income therefrom of the estate of Jackson Barnett, a full blood Creek Indian Roll No. 4524, who died intestate in the

State of California on May 29, 1934. Proper order was entered on said date extending time for thirty days from and after said date in which to file in said cause its petition for removal from the County Court of Muskogee County, Oklahoma, to the United States District Court for the Eastern District of Oklahoma. On July 15, 1934, by proper order, said cause was removed to this court. Motion has been duly made for same to be remanded to the County Court of Muskogee County, Oklahoma.

Prior to such removal issue was joined in said court averring that the heirs were correct as set out in said petition or pleadings, and that all of the said heirs named therein are full-blood Creek Indians heirs of Jackson Barnett, deceased, enrolled as a full-blood Creek Indian, and prayed that the heirs therein mentioned be declared and determined to be the sole and only heirs of said Jackson Barnett, deceased. It is averred that said suit involved the estate of Jackson Barnett, deceased, a full-blood Creek Indian, and involved the disposition of the original allotment of said Jackson Barnett, which is restricted, and also funds in the hands of the Superintendent for the Five Civilized Tribes, which funds are restricted, and that the heirs of said Jackson Barnett, deceased are full-blood Creek Indians.

The petition for removal is based on Section 3 of Act of Congress approved April 12, 1926 (44 Stat. 239, entitled "Act to Amend Section 9 of the Act of May 27, 1908, * * *" which provided:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State Courts of

Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs of such Indians are parties, as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes, or the proceeds, issues, rents and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto, to the same extent as though no Indian land or question were involved. . . . Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State Court to accept such petition and proceed no further in said suit.

In *United States* v. *Mid-Continent Petroleum Corporation*, 67 Fed. (2d) 37, it is said:

> The Hosey-Guthrie Group contend that the case was improperly removed, and that the Federal court is without jurisdiction. They assert that on the death of Ullie Eagle the land in question ceased to be restricted, and therefore that no restriction member of the Five Civilized Tribes in Oklahoma, or restricted heir or grantee of such Indian was party as "plaintiff, defendant, or intervener * * * claiming * * * title to or an interest in lands allotted to a citizen of the Five Civilized Tribes." It was alleged in the notice and in the petition for removal that a large number of persons who were either parties defendant or interveners were restricted members of the Five Civilized Tribes and claimed some right, title, and interest in such land. This allegation is not challenged either by pleading or proof. At the time of the filing of the petition for removal, Lizzie Tiger nee Gambler, and Isla Wolf were parties to the action. The notice and petition for removal alleged that they were restricted members of the Five Civilized Tribes. The proof shows that both were enrolled full-blood citizens of the Creek Tribe. Lands passing to full-blood heirs remain under qualified restrictions by virtue of section 9 of the Act of May 27, 1908 (35 Stat. 312, 315); *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 954; *United States* v. *Gypsy Oil Co.* (C. C. A. 8) 10 F. (2d) 487; *Holmes* v. *United States* (C. C. A. 10) 53 F. (2d) 960. Thus it will be seen that there were parties to the action who were clearly within the class designated in section 3, supra.

In said opinion it is further said:

> The Hosey-Guthrie Group assert that section 3, supra, does not of itself give a Federal court jurisdiction on removal, but that other independent grounds of Federal jurisdiction must exist. Such a construction is contrary to the express terms of section 3, supra, and would make the removal provision thereof superfluous and useless.

In Re Will of Hicks Palmer, Deceased, No. 4284 Equity, on a motion to remand in this district the question of jurisdiction of said court under said section 3 was raised after the suit had been removed to this court by the United States Government, the motion to remand being made on the part of the principal legatee in the will. In a memorandum this court said:

> The question in this case is whether these proceedings are in the nature of a suit or cause within the meaning of this removal act of April 12, 1926. Prior to that act a proceeding to probate a will was not removable to the United States District courts on account of a diversity of citizenship. The probating of this will involves the title to the allotment of a restricted Indian and to the restricted funds of a restricted Indian and to restricted lands of a restricted Indian or claimed by a restricted Indian. The jurisdiction of this court in such a matter was within the purpose of the act of April 12, 1926, and it seems to be within the letter of the act, which had the effect of enlarging the jurisdiction of the United States District Court for such purpose.

Before deciding whether the jurisdiction is within the words of the statute, we should consider whether the particular class of acts to which this belongs is within the purpose of the statute.

Holy Trinity Church v. *U. S.*, 143 U. S. 467, 12 Sup. Ct. 511, 36 L. Ed. 226;

U. S. v. *Union Bank of Canada* (C. C. A.) 262 Fed. 91;

De Hasque v. *A. T. & S. F. Ry Co.* (Okla.) 173 Pac. 73, L. R. A. 1918 P. 259.

In *United States* v. *Smith*, 266 Fed. 741, it is said:

"It is a well-recognized rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be reasonably given to them, unless the expressed intent is so clear as to remove it from the domain of the application of rules of construction. This rule should also apply to legislation by Congress relating to Indians, when at the same time the expressed public policy of the government towards such wards is followed."

Whilst the evident purpose of this act was to afford a speedy means to quiet titles on Indian allotments, yet it is clear by thereby permitting the United States Government to be made a party for such purpose, that it was the intention of Congress that when the United States Government was brought in that it should have the privilege of having all essential adjudications made in the United States Court. To say that these statutes are to receive such strict construction that in

cases involving succession through wills or inheritance that as to probating of the wills and such matters of administration and the distribution of the estate there should be such strict construction as to leave same to state tribunals such construction of law and finding of fact, does not appear to be within the purpose of this act. To say to the restricted heir as to succession by will or distribution through an administration: "You must wait for such matters to be finally adjudicated in the state tribunal and then bring suit in ejectment and then that controversy can be brought in the United States Court," would operate so that the United States Court would be bound by the findings of fact and conclusions reached as to the probate of the will or the distribution of restricted allotted lands, or the restricted funds derived therefrom? The probation of the will or the determination of heirship and order of distribution in the state tribunal, and, thereafter the bringing of a suit in ejectment and challenge title as a result thereof, when the United States Government can be made a party thereto and remove it to the Federal Court, where the Federal Court would be bound by such action in the state court, would not be within the terms of such declared policy, for then the Federal Court would be bound by such findings and orders that became final in the state tribunal.

In said Act of April 12, 1926, the requirement for conveyances by such full-blood Indians of any interest in lands restricted by Section 1 of the Act of May 27, 1908, is extended so as to cover lands acquired by succession from an allottee by devise. The Act of January 27, 1933, relative to

restrictions applicable to Indians of the Five Civilized Tribes in Oklahoma, by Section 6, provides all appropriate proceedings to be instituted in the Federal Courts.

In *Plowden Weston et al.* v. *The City Council of Charleston*, 27 U. S. (2 Pet.) 449, Chief Justice Marshall, in speaking for the Supreme Court of the United States, said:

> The term suit is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him. The modes between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.
>
> In interpreting the statutes, the court will look to the nature of the rights to be asserted and maintained rather than the manner in which the party may be obligated to proceed to assert those rights and in determining the nature of the suit regard will be had to the subject matter of the litigation. The court will examine the record and form its own conclusions as to the real nature of the proceeding, irrespective of the means by which the litigants propose to obtain the relief desired.

Federal Procedure, Vol. 1, page 807.

> Suit—broad meaning—in general—Prosecution or pursuit of some claim, demand or request; the act of suing, the process by which one endeavors to gain an end or object; attempt to attain a certain result, the act of suing; the process by which one gains an end or object. C. J. 37, page 622.
>
> The word suit is of comprehensive signification and applies to any proceeding in

> a court of justice in which a person pursues a remedy which the law affords him for the redress of an injury, or the recovery of a right and it includes both actions and proceedings.

In re Sherill, 81 N. E. 124 (N. Y. Court appeals).

In *Ex Parte Milligan*, 71 U. S. (4 Wall. 2), at page 112, it is said:

> But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it. This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right"—and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action from *ago*, to urge or drive." In any legal sense, action, suit, and cause are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But, the true meaning to the term "suit" has been given by this court. One of the questions in *Weston*

v. *City Council of Charleston,* was, whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him * * *. One of the questions in *Holmes* v. *Jennison et al.,* 14 Peters 540, was, whether under the 25th section of the Judiciary Act a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held that "if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by habeas corpus was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing. The court does not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a suit—the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the Act of 1802. But it is argued, that there must be two parties to the suit, because the point is to be stated upon the request of "either party or their counsel." Such a literal and technical construction would defeat the very purpose the legislature had in view, which

was to enable any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party" in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction.'

See also *Re Wah-Kon-Tah-He-Um-Pah's Estate*, 109 Okla. 266.

In *Brohead* v. *Shoemaker, et al.*, 44 Fed. 518, Syllabus No. 1 is as follows:

> I. Removal of causes—Probate Proceeding. Under Code Ga. Secs. 2424, 2427, which provide for the probating of a will in column form by a proceeding inter parties which is conclusive as against those contesting the will, such a proceeding is a suit within the meaning of the removal statutes.

At the time *Brohead* v. *Shoemaker*, *supra*, was before the court under the provisions of the Act of Congress of August 13, 1888 (25 Stat. 433) it was provided that removals of actions pending in the state courts could be removed to United States courts on the ground of prejudice or local influence at any time before the trial.

See also *Waterman* v. *Canal-Louisiana Bank Company*, 215 U. S. 33.

CONCLUSIONS OF LAW

I conclude that this proceeding comes within the term "suit" as used in the Act of April 12, 1926, and I assume for the purpose of this case that prior to the Act of April 12, 1926, that such suit as here presented was not removable to this court.

See *In Re Cilley* (C. C. D. New Hampshire) 58 Fed. 977.

Copeland v. *Rooney* (Indiana) 72 Fed. 5.
In Re McDonald's Estate (Minnesota) 42 Fed. (2d) 266.
Ellis v. *Davis*, 109 U. S. 45.
In Re Gray's Estate (7th CCA) 66 Fed. (2d) 367.
Atwood v. *Rhode Island Hospital Trust Co.* (1st CCA) 34 Fed. (2d) 18.

In *Re Jessie's Heirs*, 259 Fed. 694, was when the County Judge was acting as a Federal Agent, and not as a court, and prior to Act of April 12, 1926, and has no application here.

The contention is further made that Section 3 of the Act of April 12, 1926 (44 Stat. 239), under which this proceeding is removed here, should be construed in connection with the Act of June 14, 1918 (40 Stat. 606), so as to permit a determination of heirship in the proper County Court, which would be binding and conclusive Federal Courts in litigated controversies where the restricted heir was thereafterwards a party. Section 8 of the Act of January 27, 1933, required probate attorneys, provided for under the Act of May 27, 1908, as amended by the Act of April 12, 1926, to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which such restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any

county court approving the sale of any interest in land, to the district court of the district to which the county is a part. Clearly showing a settled public policy on the part of the United States Government to protect full-blood or restricted Indian heirs as to restricted allotted lands and restricted funds derived therefrom. A strict construction should not be here had, but one to carry out the purpose of the Congress of the United States whilst providing for the final determination of titles so as to prevent prolonged litigation and trouble, but at the same time vouchsafing that the final determination when the United States Government was brought in as a party should be, at its election, in the proper United States Court. However, it appears to me that the question of the appointment of an administrator is purely a probate matter, and that that rests with the County Court. But the question as to the determination of heirship for the purpose of participating in the restricted funds that are in the possession of the Superintendent for the Five Civilized Tribes, and the restricted allotment located within district, is within the jurisdiction of this court and as to the participation as a restricted heir in the restricted funds, and allotted lands is within the jurisdiction of this court, that that question is properly removed to this court and insofar as that question is involved this court will retain jurisdiction on removal, but the question as to the appointment of the administrator is remanded to the County Court.

(Signed) R. L. WILLIAMS,
Judge.

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